Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-336–08 OF 2016
TENGKU MAIMUN, AHMADI ASNAWI AND ZALEHA YUSOF JJCA
10 JANUARY 2018

Administrative Law — Exercise of administrative powers — Judicial review — Minister's order prohibiting printing of books — Whether order ultra vires s 7 of Printing Presses and Publications Act 1984 — Whether books prejudicial to public order — Whether Minister's decision in making order suffered from illegality — Whether appellant given opportunity to be heard — Whether order contravened art 8(1) of Federal Constitution — Whether order valid

The appellant was an academician who specialised in comparative literature and human rights. He was also an author of academic and creative books and articles, a scriptwriter and a poet. The Minister ('the respondent') issued an order ('the order'), pursuant to s 7(1) of the Printing Presses and Publications Act 1984 ('the Act'), prohibiting the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of books entitled 'Sebongkah Batu di Kuala Berang,' 'Karbala', 'Tiga Kali Seminggu' and 'Ingin Jadi Nasrallah' ('the four books'). According to the appellant, the four books had been in circulation in the market prior to the prohibition without any prejudice to public order and security and that the order was irrational. The appellant thus filed for judicial review to quash the order made by the respondent but the application was dismissed by the High Court on the ground that it was lawful for the respondent to act in the way he did to ban the four books under sub-s 7(1) as the books were likely to be prejudicial to public order. Hence the present appeal. The issue that arose was whether the impugned order under sub-s 7(1) of the Act was validly made.

Held, allowing appeal:

(1) The order, which prohibited the four books, described the books as 'likely to be prejudicial to public order'. The words 'is likely' show it has potential to happen, might happen or probably to happen. What needed to be proven was not the 'actual public disorder' but anything which was the potential to disrupt public order. The High Court judge did not explain what was the 'potential'. If it was indeed prejudicial to public order, there was no evidence of any chaos or disorder happening in the country at present or even at the time the order was made. The reasoning was complete unsustainable (see paras 23 & 32).

(2) Having read the four books, the court could not understand how they could create public disorder or a threat to security. For example, in 'Tiga Kali Seminggu', the short story 'Rindu ini Luar Biasa' was about two people falling in love during their fight to elevate the use of Bahasa Malaysia and how position, status and power could change people's viewpoint. The short story 'Bulan Penuh di Saigon' was about a woman who was determined to look for her real mother upon discovery that she was actually an adopted child, after her adopted mother passed away. The short story of 'Cinta Medeni' was a pure love story. The poem 'Balada' in 'Ingin Jadi Nasrallah' was nothing but the expression of guilt by someone who felt that he had committed so much sins that now he has repented and showed remorse and asked for forgiveness from his Creator. The poem 'Baitullah' was nothing but about the Baitullah, the House of God for Muslims (see paras 38–39).

(3) The order was not made in accordance with sub-s 7(1) of the Act and was therefore illegal. The order was a restriction on the appellant's constitutional and fundamental right to freedom of expression (see para 44).

[Bahasa Malaysia summary

Perayu adalah seorang ahli akademik yang pakar dalam perbezaan kesusasteraan dan hak-hak kemanusiaan. Dia juga merupakan penulis akademik dan buku-buku kreatif dan artikel, seorang penulis skrip dan pensyair. Menteri ('responden') telah mengeluarkan perintah ('perintah') bawah s 7(1) Akta Mesin Cetak dan Penerbitan 1984 ('Akta'), melarang percetakan, import, pengeluaran, pengeluaran semula, penerbitan, jualan, pengedaran atau milik buku-buku bertajuk 'Sebongkah Batu di Kuala Berang', 'Karbala', 'Tiga Kali Seminggu' dan 'Ingin Jadi Nasrallah' ('empat buku'). Menurut perayu, empat buku ini telah diedarkan dalam pasaran sebelum larangan tanpa apa-apa prejudis terhadap ketenteraman dan keselematan awam dan bahawa perintah tersebut tidak rasional. Perayu memfailkan semakan kehakiman untuk membatalkan perintah yang dibuat oleh responden tetapi permohonan ini ditolak oleh Mahkamah Tinggi atas alasan sah di bawah undang-undang untuk responden bertindak mengharamkan empat buku ini bawah sub-s 7(1) kerana buku-buku ini berkemungkinan memprejudis ketenteraman awam. Oleh itu rayuan ini. Isu yang timbul adalah sama ada perintah yang dipertikaikan bawah sub-s 7(1) dibuat dengan sah.

Diputuskan, membenarkan rayuan:

(1) Perintah tersebut, yang melarang empat buku ini, menyatakan buku-buku ini berkemungkinan memprejudis ketenteraman awam. Perkataan-perkataan 'mungkin' menunjukkan ia mempunyai potensi untuk berlaku, mungkin berlaku atau mungkin akan terjadi. Apa yang perlu dibuktikan bukanlah ketidaktenteraman sebenar tetapi apa-apa

yang berpotensi mengganggu ketenteraman awam. Hakim Mahkamah Tinggi tidak menjelaskan apa potensinya. Jika benar ia sememangnya memprejudis ketenteraman awam, tiada keterangan kacau-bilau atau ketidaktenteraman berlaku di negara ini buat masa kini atau semasa perintah tersebut dibuat. Alasan ini langsung tidak boleh dikekalkan (lihat perenggan 23 & 32).

(2) Setelah membaca empat buku ini, mahkamah tidak mengerti bagaiman kesemuanya boleh menyebabkan ketidaktenteraman atau mengugut keselamatan. Contohnya, dalam 'Tiga Kali Seminggu', cerpen 'Rindu Ini Luar Biasa' mengisahkan dua orang yang jatuh cinta ketika perjuangan mereka mempertingkatkan penggunaan Bahasa Malaysia dan bagaimana kedudukan, status dan kuasa boleh mengubah sudut pandangan manusia. Cerpen 'Bulan Penuh di Saigon' mengisahkan seorang wanita yang bertekad mencari ibu kandungnya selepas mendapat tahu dia sebenarnya anak angkat selepas ibu angkatnya meninggal dunia. Cerpen 'Cinta Medeni' adalah kisah cinta sejati. Sajak 'Balada dalam 'Ingin Jadi Nasrallah' tidak lain tetapi penzahiran kekesalan oleh seseorang yang merasakan dia telah banyak melakukan dosa hinggakan kini dia ingin bertaubat dan menunjukkan kekesalannya dan memohon pengampunan Penciptanya. Sajak 'Baitullah' tidak lain tetapi tentang Baitullah, Rumah Tuhan bagi orang Islam (lihat perenggan 38–39).

(3) Perintah tersebut tidak dibuat selaras dengan sub-s 7(1) Akta dan dengan itu tidak sah. Perintah tersebut satu sekatan terhadap hak perlembagaan dan asasi perayu untuk bebas menyuarakan pendapatnya (lihat perenggan 44).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 130–160.

Cases referred to

Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174, CA (distd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307, FC (refd)

Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340, CA (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia [1969] 2 MLJ 129, FC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn

Bhd [1979] 1 MLJ 135, FC (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
S Rangarajan v P Jhagivan Ram & Ors [1989] SCC (2) 574, SC (refd)
SK Kader v State of West Bengal AIR [1972] SC 1647, SC (refd)
Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit [2014] MLJU 1874; [2015] 2 CLJ 328, CA (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
ZI Publication Sdn Bhd v Timbalan Menteri Dalam Negeri & Ors [2014] 3 MLRH 708, HC (refd)

Legislation referred to

Federal Constitution arts 8, 10, 10(2), (2)(a)
Printing Presses and Publications Act 1984 ss 2, 7(1)
Rules of Court 2012 O 53

Appeal from: Application for Judicial Review No 25–196–06 of 2015 (High Court, Kuala Lumpur)

Abdullah Abdul Rahman (Nur Syakeera Idora Ahmad Affandi and Derrick Moh Ka Yew with him) (Cheang & Ariff) for the appellant.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur, dated 8 August 2016, dismissing the appellant's judicial review application seeking to challenge the respondent's order dated 12 February 2015 ('the order') to prohibit four books ('the four books') written by the appellant, pursuant to sub-s 7(1) of the Printing Presses and Publications Act 1984 ('Act 301').

PARTIES

[2] The appellant is an academician at the University Kebangsaan Malaysia ('UKM') and his current appointment is as a Research Fellow of the Institut Alam dan Tamadun Melayu, UKM, specialising in the areas of comparative literature, creative writing, film and theatre studies and human rights. He holds the Bachelor of Syariah degree from University of Malaya, the Master of Arts (Literature) degree from University Sains Malaysia and the Doctor of Philosophy (PhD) degree from UKM. He has written many books, creative as well as academic, written various articles in academic as well as non-academic journals and presented academic papers at various conferences.

[3] He has received various awards in the field of literature at the state, national and international level, among others by the South East Asia Literature Council as best author of the Majlis Sastera Asia Tenggara in 2005 and by the Government of Malaysia as the National Art Award receiver in 2006.

[4] The respondent is the Minister of Home Affairs responsible for Act 301.

THE ORDER

[5] The order which was published in the government *gazette* dated 1 April 2015 as PU(A) 67/2015, inter alia, reads as follows:

> 2. The printing, importation, production, reproduction, publishing, sale issue, circulation, distribution or possession of the publications described in the Schedule which is likely to be prejudicial to public order and security are absolutely prohibit throughout Malaysia.
>
> The Schedule in PU (A) 67/2015 described the 4 books as:
>
> (i) Sebongkah Batu di Kuala Berang
>
> (ii) Karbala
>
> (iii) Tiga Kali Seminggu
>
> (iv) Ingin Jadi Nasrallah.

THE NATURE OF THE FOUR BOOKS

[6] We have personally perused the four books. We agree with the description of the books by learned counsel for the appellant in his written submissions which we will reproduce, inter alia, as follows:

> *Sebongkah Batu di Kuala Berang*
>
> (a) 'Sebongkah Batu Di Kuala Berang' may be classified as an academic work interwoven with narrative written in the Malay language. It is about a group of university students completing their final assignment by producing a documentary drama on the coming of Islam to the Malay Peninsula (Tanah Melayu);
>
> (b) the story on the coming of Islam traces the history of the Terengganu Inscription Stone (Batu Bersurat Terengganu) which in this book is referred to as the block of stone in Kuala Berang (Sebongkah Batu di Kuala Berang). There is a discussion on the coming of Islam to the Java Island through the preaching by Wali Songo. Then, there is a discussion on the hypothesis that the coming of Islam to a few places in the Tanah Melayu, in particular Terengganu, had possibly originated from Persia. The reasons include that the Perso-Arabic script on the Terengganu Inscription Stone

A is of the Nastaliq calligraphy which tended to be widely used in Persia. Finally, there is a discussion as to whether the early preachers of Islam and early Muslims in Tanah Melayu had been of the Shafie School as well as the Jaafari school; and

B (c) the author included endnote academic references for the discussions in the book which may be found at pp 177–180 of the book.

Karbala

(a) 'Karbala' is essentially a script of a drama or stage play in the Malay language on the famous event in Karbala, Iraq, that befell Hussein ibn Ali, C the grandson of Prophet Muhammad (PBUH);

(b) there are four chapters in the book 'Karbala'. The main chapter titled 'Drama' was actually the second publication of the work after it had been published as a monthly series in the Dewan Sastera magazine from December 2006 to June 2007;

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(c) the second chapter titled 'Wawancara dengan Faisal Tehrani Dalam Majalah Millinia Muslim' was also the second publication of the interview after it had been published in the Millinia Muslim magazine in February 2007;

E (d) the third chapter titled 'Wawancara dengan Faisal Tehrani Dalam Majalah Dewan Sastera' was also the second publication of the interview after it had been published in the Dewan Sastera magazine in March 2007; and

(e) the fourth chapter includes the appellant's article 'Sejarah Alternatif Dalam Ta'ziyeh (Iran) dan Boria (Pulau Pinang):

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Upaya Pemugaran Sejarah Yang Dinafi Penguasa' which originally was the Appellant's paper presented at the International Conference on South East Asian Literature organised by the South East Asian Literature Council and held at Dewan Bahasa dan Pustaka on 27 to 28 November 2007.

G *Tiga Kali Seminggu*

(a) this book is a collection of 15 short stories of various genres in the Malay language, 12 of which had been published in magazines and newspapers;

(b) three of the short stories won literary awards including under the 'Islam' H category. The titles of these short stories and the details of their publication and/or awards are as follows:

(i) 'Rindu Ini Luar Biasa'. This won the second place for the short story category in the writing competition by Dewan Bahasa dan Pustaka in 2007 in conjunction with its 50th Anniversary;

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(ii) 'Abuya Dongeng Tokoh Yang Memakan Babi'. This had been published in the *Utusan Melayu* newspaper on 13 October 2008 and 20 October 2008 under the title 'Abuya dan Dongeng Tokoh Yang Memakan Babi';

(iii) 'Antiplot' had been published in the *Mingguan Malaysia* newspaper on 22 June 2008;

(iv) 'Bulan Penuh di Saigon' had won the 12th Islamic Literature Prize organised by Dewan Bahasa dan Pustaka and Yayasan Pelajaran Islam in 2009;

(v) 'Cinta Medeni' had been published in the *Utusan Melayu* newspaper on 3 December 2007 and 10 December 2007;

(vi) 'Dangai, Pau dan Maruku' had been published in the *Dewan Siswa* magazine in August 2009;

(vii) 'Hajah Abidah' had been published in the *Nur* magazine in December 2008;

(viii) 'Latar' had never been published;

(ix) 'Manifesto Mergastua' had been published in the *Dewan Sastera* magazine in June 2009;

(x) 'Muhammad Ulul Albab' had been published in the *Mingguan Malaysia* newspaper on 14 June 2009;

(xi) 'Muthupalaniappan' had been published in the *E-Siswa* magazine in May 2009;

(xii) 'Perlak Emak' had been published in the *Dewan Budaya* magazine in September 2008;

(xiii) 'Tiga Kali Seminggu'. The appellant is not sure whether this had been published elsewhere prior to inclusion in the book;

(xiv) 'Setelah Diciptakan Adam' had won the 11th Islamic Literature Prize organised by Dewan Bahasa dan Pustaka and Yayasan Pelajaran Islam in 2004; and

(xv) 'Kegawatan' had never been published.

Ingin Jadi Nasrallah

(a) 'Ingin Jadi Nasrallah' is a collection of 33 poems in the Malay language, 13 of which had been published in magazines and newspapers;

(b) the poems in 'Ingin Jadi Nasrallah' which had been published in newspapers and magazines are as follow:

(i) 'Seperti Camar Bosphorus' had been published in the *Mingguan Malaysia* newspaper on 28 November 2004;

(ii) 'Keretapi Ke Pulau Hujung' had been published in the *Mingguan Malaysia* newspaper on 18 May 2008;

(iii) 'Lalat di Mimbar Masjid' had been published in the *Mingguan Malaysia* newspaper on 23 September 2007;

(iv) 'Ingin Jadi Nasrallah' had been published in the *Dewan Sastera* magazine in September 2006;

(v) 'Di Manzil' had been published in the *Dewan Sastera* magazine in August 2004;

(vi) 'Usaha Gigih' had been published in the *Dewan Sastera* magazine in August 2004;

(vii) 'Doa 2' had been published in the *Dewan Sastera* magazine in August 2004;

(viii) 'Sepucuk Surat Berisi Revolusi' had been published in the *Dewan Sastera* magazine in October 2000;

(ix) 'Perempuan Baitul Laham' had been published in the *Dewan Sastera* magazine in November 2003;

(x) 'Bulan Pucat di Bosnia Herzegovina' had been published in the *Dewan Sastera* magazine in October 1995;

(xi) 'Serigala Dalam Susu' had been published in the *Mingguan Malaysia* newspaper on 28 January 2007;

(xii) 'Balada Orang Berdosa' had been published in the *Mingguan Malaysia* newspaper on 6 September 1998; and

(xiii) 'Jiwa Palestina' had been published in the *Mingguan Malaysia* newspaper on 6 July 2003.

ISSUE

[7] Before we deal with the issue, we would like to emphasise that being a judicial review matter, our function here is to examine the conduct of the authority to ensure that it has acted within the scope of its lawful power. Hence, the issue here is whether the impugned order made under sub-s 7(1) of Act 301 suffers from illegality, irrationality, procedural impropriety and unreasonableness.

SUBSECTION 7(1) OF ACT 301

[8] To understand the issue, it is relevant for us to reproduce the said provision of sub-s 7(1). It reads:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement, or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, the relationship with any foreign country or government or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the

printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

THE GROUNDS AS STATED BY THE MINISTER/RESPONDENT

[9] The grounds for the order as found in the 'affidavit balasan' at p 139 of *rekod rayuan Jld* 2(1) are as follows:

> Merujuk perenggan 19 hingga 22 Afidavit Sokongan Pemohon, saya dengan sesungguhnya percaya bahawa saya telah meneliti syor dan ulasan oleh Bahagian Kawalan Penerbitan dan Teks Al Quran sebelum memutuskan untuk melarang penerbitan 4 Buku tersebut oleh Pemohon. Bagi tujuan menzahirkan alasan-alasan dalam membuat Perintah Larangan tersebut, saya telah mempertimbangkan perkara-perkara berikut:
>
> (a) Bahagian Kawalan Penerbitan dan Teks Al Quran telah mengkaji isi kandungannya dan mendapati 4 Buku tersebut mengandungi unsur-unsur yang mengelirukan umat Islam di negara ini yang dikhuatiri akan menimbulkan ancaman keselamatan serta menggugat ketenteraman awam;
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> (b) Saya telah merujuk 4 Buku tersebut untuk mendapatkan pandangan dan nasihat daripada pakar-pakar berkaitan agama Islam daripada Jabatan Kemajuan Islam Malaysia (JAKIM) dan saya telah mempertimbangkan kajian yang dikemukakan oleh JAKIM sebelum membuat keputusan;
>
> (c) Saya juga merujuk kepada keputusan Muzakarah Khas Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Agama Islam yang telah bersidang pada 5 Mei 1996 yang telah memutuskan seperti berikut:
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> (i) Menetapkan bahawa umat Islam di Malaysia hendaklah mengikut ajaran Islam serta adalah tertakluk kepada undang- undang Islam Hukum Syarak yang berasaskan pegangan Ahli Sunnah Wal Jamaah;
>
> (ii) Memperakukan bahawa ajaran Islam yang lain daripada Ahli Sunnah Wal Jamaah adalah bercanggah dan penyebaran apa-apa ajaran yang lain adalah dilarang;
>
> (iii) Menetapkan bahawa penerbitan, penyiaran dan penyebaran apa-apa buku, risalah, filem, video dan lain-lain berhubung dengan ajaran yang bertentangan dengan Ahli Sunnah Wal Jamaah adalah diharamkan.
>
> (d) Sebagai contoh antara isi kandungan di dalam 4 Buku tersebut, Pemohon kagum dan berkeinginan menjadi seperti Hassan Nashrullah iaitu pemimpin Hizbullah, gerakan Syiah di Lubanan. Kekaguman terhadap tokoh syiah ini jelas menampakkan kepercayaan Pemohon terhadap Syiah;

(e) Sebagai contoh lain, Pemohon juga memburuk-burukkan khalifah kedua Bani Umaiyyah iaitu Yazid anak Saidina Mu'awiyah bin Abu Sufyan dengan mengatakan Yazid adalah golongan fasik dan menyamakan seperti Zionis dan Hitler. Ungkapan 'kita tidak boleh mengamalkan politik kotor ala Muawiyah dan Yazid' jelas menghina sahabat Rasullah dan adalah merupakan ungkapan yang sering digunakan oleh penganut Mazhab Syiah;

(f) Isi kandungan 4 Buku tersebut juga memuatkan ayat provokasi 'wajib kita tebus kembali' untuk membangkitkan rasa marah terhadap Saidina Abu Bakar RA dan para sahabat beliau (dalam peristiwa rampasan Tanah Fadak) dan provokasi sebegini dikhuatiri akan mewujudkan perbalahan antara golongan Ahli Sunnah Wal Jamaah dan golongan Syiah seperti yang berlaku di Syria sekarang;

(g) Dalam hal ini, saya telah dinasihatkan oleh pakar-pakar daripada JAKIM dan sesungguhnya percaya bahawa memandangkan negara ini mengamalkan ajaran Islam berdasarkan ajaran Ahli Sunnah Wal Jamaah, pertembungan dua fahaman antara Ahli Sunnah Wal Jamaah dan Syiah ini dikhuatiri boleh mencetuskan ancaman keselamatan dikalangan ummah seperti yang berlaku di negara Arab sekarang;

(h) Secara keseluruhannya, 4 Buku tersebut banyak mengandungi idea-idea yang mempropagandakan pegangan Syiah dan perbuatan Pemohon mendewa-dewakan ekstrimis Syiah bersenjata, Hizbullah di Lubanan dikhuatiri akan menimbulkan kemarahan umat Islam di Malaysia. Pemikiran sebegini boleh membawa kepada kecelaruan antara umat Islam dan seterusnya mencetuskan suasana tidak tenteram di dalam ummah sehingga boleh membawa kepada perpecahan umat Islam yang mana akan memprejudiskan ketenteraman awam sekiranya ia dibiarkan berleluasa;

(i) Tindakan saya untuk mewartakan dan 4 Buku tersebut sebagai buku yang dilarang pencetakan dan pencetakannya adalah selaras dengan bidang kuasa yang diberikan kepada saya untuk mengelakkan kekeliruan orang awam secara khususnya umat Islam di negara ini dengan karya-karya yang cenderung ke arah ajaran syiah yang ditulis oleh Pemohon dalam 4 Buku tersebut;

(j) Oleh itu, suatu keputusan dan tindakan segara harus dilaksanakan bagi menyekat 4 Buku tersebut daripada, antara lainnya, terus dicetak, diterbit dan/atau dipasarkan kepada umum di negara ini.

[10] Based on those reasons, the respondent averred that the 'prohibition is justified as it is prejudicial to public order and security'. This averment can be found in para 20 of the respondent's affidavit at p 143 of the *rekod rayuan*:

> Berdasarkan dengan alasan-alasan di atas, saya berpuashati bahawa Buku tersebut wajar untuk dikenakan perintah larangan di bawah seksyen 7(1) Akta Mesin Cetak dan Penerbitan 1984 (Akta 301) *kerana ia memudaratkan ketenteraman awam dan keselamatan* sebagimana yang dibutirkan di dalam Perintah Larangan tersebut.

DECISION OF THE HIGH COURT

[11] The learned High Court judge was of the view that the fact that there was no actual occurrence of public disorder during the four and seven years the books had been in circulation ought not to be made the true and correct test in determining the legality of the order as the phrase 'prejudicial to public order' as found in sub-s 7(1) does not necessarily refer to the existence of an actual public disorder but include anything which has the 'potential' to disrupt public order. She found support in the decision of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 2 MLJ 129 as refered by the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 and also the Federal Court in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 and the Indian Supreme Court case of *SK Kader v State of West Bengal* AIR [1972] SC 1647. Her Ladyship was of the view that it is the duty of the government to preserve public peace and order as observed by Raja Azlan Shah J (as His Majesty then was) in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108. She noted that the respondent's grounds in making the order were essentially from the advice given by his officers, JAKIM and from his own appreciation of the contents of the publication.

[12] She found it was lawful for the respondent to act in the way he did to ban the four books under on the ground that the book is likely to be prejudicial to public order. Her Ladyship quoted the Court of Appeal in *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174 on the scope and extent of sub-s 7(1) and accepted the submission of learned senior federal counsel that the respondent's decision in making the impugned order did not suffer from illegality since the reasoning affirmed in his affidavit were in fact based on public order grounds.

[13] Her Ladyship also found that the respondent did not take into account irrelevant consideration when he relied on the decision of the Jawatankuasa Fatwa as the content of the publication relates to Islamic law matter and therefore it would be reasonable for the Minister to place reliance on the decision of the Jawatankuasa Fatwa.

[14] The learned High Court judge also found that the order did not suffer from procedural impropriety as the appellant was given the opportunity to be heard when he was called for a meeting to discuss on the proposed ban but he chose not to attend.

[15] Her Ladyship was also of the view that since Act 301 was enacted pursuant to the provision of art 10(2)(a) of the Federal Constitution which aims to limit freedom of expression of individuals on the grounds, inter alia,

prejudicial to public order as stated in sub-s 7(1), the appellant's argument that his right under art 8 of the Federal Constitution has been infringed, that he was not treated equally with the publishers of other magazines and/or newspaper which had published works from three of the fourbooks earlier without being similarly prohibited, cannot be sustained. Her Ladyship stressed that the appellant's right under art 8 is therefore not absolute.

[16] Based on the above the appellant's application for judicial review was dismissed.

OUR DECISION

[17] provides for equality before the law for all Malaysia citizens. While art 10 allows the right to freedom of speech and expression. However, as rightly said by the learned High Court judge and submitted by learned senior federal counsel, the rights conferred under the articles are not absolute as under cl 2 of art 10, Parliament is empowered to restrict these rights through the provisions of the law and Act 301 is one of the laws enacted pursuant to that restriction which aims to limit freedom of expression, inter alia, in the interest of the security of the Federation and public order. Therefore the validity of the law ie sub-s 7(1), is not in question here. What is to be determined is whether, applying the factual matrix of the instant case, the order is validly made.

[18] It cannot be disputed that sub-s 7(1) of Act 301 gives absolute discretion to the Minister to make such order as the impugned order. See *Arumugam a/l Kalimuthu*. However, it also cannot be disputed that such discretion must also have legal limits to avoid it being abused. This principle had been emphasised by the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148, and have been quoted by many other decisions thereafter:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression ...

[19] We must also bear in mind, that it is the appellant's contention that his fundamental rights under the Federal Constitution have been infringed. The recent trend in judicial review as decided by our apex court is that the test used had advanced from the subjective to that of the objective test, if state action affects fundamental right, the court will not only look into procedural fairness but also substantive fairness. See: *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765. Hence in this

instance, this court is entitled to look not only at the procedural aspects but also at the substance or merits of decision made by the minister. It is therefore not wrong for this court to enquire as to the reasonableness or fairness of the minister's decision.

[20] Learned senior federal counsel submitted that the learned High Court judge had followed the objective test. With respect we disagree. In considering the minister's affidavit only and in failing to consider the facts presented by the appellant on the nature and contents of the four books and in treating the prior circulation as irrelevant to the minister's assertion as to the potentiality of the four books to prejudice public order, we find that the learned High Court judge had in fact applied the subjective test. Having said that, the cases of *Karam Singh*, and *Nasharuddin Nasir*, which used subjective test could not prevail over *Titular Roman Catholic*'s case. Consequently, with due respect, the learned High Court judge erred when she placed reliance on those two cases.

[21] The order which prohibits the four books, describes the four books as 'is likely to be prejudicial to public order'. The learned High Court judge in para 26 of Her Ladyship's grounds of judgment viewed that the phrase 'prejudicial to public order' does not necessarily refer to the existence of an actual public disorder, but include anything which has the 'potential to disrupt public order'. With due respect, we feel the emphasis ought to be put on the words 'likely to be prejudicial to' and not merely 'prejudicial to public order' as sub-s 7(1) of Act 301 provides for two situations, one is where the publication *is prejudicial* to public order and the other where it *is likely to be prejudicial* to public order. In this instant case, the order states that it 'is likely to be prejudicial'. If it is prejudicial to public order, then it must be shown the existence of the actual public disorder. But if it is 'likely to be prejudicial to public order', as in the instant case, then it would cover anything which has the potential to disrupt public order. So in this context, even though we agree with the learned High Court judge, that what needs to be proven here is not 'actual public disorder' but anything which has the potential to disrupt public order; it is not because of the words 'prejudicial to public order' but because the order states 'is likely to be prejudicial to public order'. After saying those, we must also say, to be fair to the learned High Court judge, Her Ladyship did refer to 'the books are likely to be prejudicial to public order and security' in other paragraphs of her judgment.

[22] Further, as shown in para 10 of this grounds of judgment, the Minister himself seems to be confused, with due respect, when in para 20 of his affidavit he averred that the prohibition is justified as *it is prejudicial* to public order and security, when the order states *is likely* to be prejudicial.

[23] If *it is* indeed prejudicial to public order, there is no evidence before us

of any chaos or disorder that is happening in this country at present, or even at the time the order was made, caused by the circulation of the four books. That reasoning is completely unsustainable.

[24] If we go by 'it is likely to be prejudicial to public order', the facts need to be examined to see whether there is any convincing evidence for such potential to happen. The learned High Court judge, with due respect, did not explain what is 'the potential'. In para 36 of her grounds of judgment Her Ladyship merely quoted paras 10 and 14 of the decision of this court in *Arumugam*'s case, and concluded in para 37 of her grounds of judgment that the impugned order does not suffer from illegality since the reasoning offered in the Minister's affidavit were in fact based on public order grounds. Learned senior federal counsel had also urged us to follow this decision as he contended that the four books have the potential to disrupt the even tempo of the life of the community.

[25] With due respect we feel that is too simplistic an approach. The case of *Arumugam*, is distinguishable as the book in that case pertained the Kampung Medan racial disturbance, which in the words of the learned High Court judge in that case, was a public order and national security issue in itself. On appeal, the decision of the High Court judge was affirmed by this court.

[26] Whereas in this instant case the prohibition was ordered on the ground that the 4 books contain elements which could confuse Muslims in this country, which confusion could lead to public disorder. The reasons given are almost similar to two other cases, one of which is *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340. This case was also quoted by learned counsel for the appellant in his submission as well as by the learned High Court judge in para 20 of her grounds of judgment.

[27] In *SIS Forum*, the book entitled 'Muslim Women and the Challenges of Islamic Extremism' was banned also under sub-s 7(1) of Act 301 on the ground it was prejudicial to public order as the book was alleged to have infringed JAKIM's guidelines as its contents could allegedly confuse Muslims, in particular Muslim women. The book had been in circulation for about two years before the ban. The High Court had allowed the respondent's application to quash the decision of the minister/appellant. On appeal, this court dismissed the appeal with costs and held as follows:

(1) The appellant's decision to ban the book was flawed and not exercised in accordance with section 7(1) of the Act;

(2) If in the two years the book was in circulation no prejudice to public order had occurred, it followed that the book was in the first place unlikely to be

prejudicial to public order. To be satisfied the book was prejudicial to public order in face of the fact no such prejudice had occurred during the two years it was in circulation was so outrageous in its defiance of logic that if fell squarely within the meaning of *Wednesbury* unreasonableness and of irrationality;

(3) Even if the book infringed JAKIM guidelines, that did not address the issue of it being prejudicial to public order.

[28] The decision in *SIS Forum*, was followed by the High Court in a later case, *ZI Publication Sdn Bhd v Timbalan Menteri Dalam Negeri & Ors* [2014] 3 MLRH 708. This is the other case mentioned earlier which has almost similar facts with this instant case. In that case two books, namely 'Allah Kebebasan dan Cinta' (national language version of the book) and 'Allah Liberality and Love' (English version of the book) were ordered to be banned under sub-s 7(1) of Act 301 on the ground that the two books were prejudicial to public order and morality. Aggrieved, the applicant filed for a judicial review under O 53 of the Rules of Court 2012 to quash the order. The High Court allowed the application. The High Court had stated:

(15) In the instance, the English version had been in circulation since June 2011. The prohibition was only made almost one year later, when the book was translated into the national language. If it's true that the book is prejudicial to public order, why was no action taken to ban its English version when it was first circulated? Why was the prohibition made only when it was translated into the national language?

(16) As I understand it, the root of the respondent's concern is 'kecelaruan keagamaan' or religious confusion. As the authority only decided to ban the book when it was translated into the national language, does it mean that only the Malay speaking readers would be confused while the English speaking readers would not, when reading the book in the first place? I cannot help but to ponder on this because the step taken to ban the book only came about when the book was translated into the national language.

(17) In any event, the High Court case in the *SIS Forum* held that tendency of the book to confuse Muslim was not public order issue. Like in *SIS Forum*'s case, the respondent in this instance has failed to show that any breach of the peace occurred or was threatened as a result of the book. It must again be emphasised that the book had been in circulation for about two weeks before it was banned, with its original version in English having been circulated in the local market since June 2011.

[29] On appeal by the respondent, this court on 13 January 2015 had dismissed the appeal and affirmed the decision of the High Court.

[30] Like *SIS Forum*, and *ZI Publication*, the four books in this instance had also been in circulation in the market prior to the order. As submitted by learned counsel for the appellant, the dates of circulation were as follow:

A (a) 'Sebongkah Batu di Kuala Berang', since March 2011 namely, around four years prior to the prohibition order;

(b) 'Karbala', since 2008 namely, around seven years prior to the prohibition order;

B (c) 'Tiga Kali Seminggu', since November 2010 namely, around 4 1/2 years prior to the prohibition order; and

(d) 'Ingin Jadi Nasrallah', since 2010 namely around five years prior to the prohibition order.

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[31] The respondent has also not disputed the number of copies of each of the four books printed for circulation which are as follow:

(a) 'Sebongkah Batu di Kuala Berang': 3,000 copies for the first print and 2,000 copies for the second print;

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(b) 'Karbala': Exact information is not available. But a few thousands as well in two prints;

(c) 'Tiga Kali Seminggu': 3,000 copies for the first print and 1,000 copies for the second print; and

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(d) 'Ingin Jadi Nasrallah': 1,000 copies for the first print.

Further, it was also shown that the Malaysian National Library had ordered 1089 copies of the book 'Karbala' on 24 November 2008.

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[32] The difference between the prohibition orders in *SIS Forum*, and *ZI Production*, with the instant order is that in the former the orders state 'is prejudicial' while in this instant case it says 'is likely to be prejudicial'. Of course it is easier to interpret the words 'is prejudicial' because it connotes the actual and current occurrence of public disorder which is not in evidence in this case. But the words 'is likely' show it has potential to happen, might happen or probably to happen. See: *Concise Oxford English Dictionary* (12th Ed, 2011). We opine as it is potentially or probably to happen, the answer to a question of whether the four books are likely to be prejudicial to public order must be based on the facts of the case. The facts of the instant case show that the four books had been in circulation for many years, between four to seven years before the order. Thousands of copies had been printed and some are even published in government's related periodical or publication and even kept in the National Library. Some had even won writing awards. Looking through the evidence as presented before us, so far, until the date of the order there had not been the slightest evidence of public disorder that had occurred. Hence, if in the many years the four books were in circulation no prejudice to public order had occurred, to borrow the words of this court in *SIS Forum*, it follows that the four books were in the first place unlikely to be prejudicial to public order. After

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all these years, for the respondent to suddenly say that he was satisfied that the four books are likely to be prejudicial to public order and that 'suatu keputusan dan tindakan segera harus dilaksanakan bagi menyekat 4 Buku tersebut ...' 'is in such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of rationality'. See *SIS Forum*.

[33] This court in *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit* [2014] MLJU 1874; [2015] 2 CLJ 328 had applied the principle extolled in the Indian Supreme Court decision of *S Rangarajan v P Jhagivan Ram & Ors* [1989] SCC (2) 574:

> Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. It should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg.

[34] What is the anticipated danger to public order that the four books will create? The danger is stated in paras 15(d), (e) and (f) of the respondent's affidavit. These pertain to the books 'Tiga Kali Seminggu' and 'Ingin Jadi Nasrallah'. To this, learned counsel for the appellant submitted that the objection to 'Tiga Kali Seminggu' was based on one line in the preface of a book of 210 pages; which had led to the prohibition of all 15 short stories in the book which had nothing to do with the one line objected to in the preface. Of these 15 short stories, three are award-winning and 12 had been published in various respectable publications such as Dewan Sastera, Dewan Budaya, Dewan Siswa, *Mingguan Malaysia* and *Utusan Melayu*. While the book 'Ingin Jadi Nasrallah' which consists of 33 poems, the objection was on the line 'wajib kita tebus kembali' found in one of the poems with the same title which is alleged to propagate the Shia school. The book is also alleged to glorify the Hezbollah group in Lebanon which is alleged to be an extremist Shia group as well as its leader, Hassan Nasrallah. Learned counsel for the appellant submitted that the respondent failed to take into account the following relevant considerations:

(a) the background to the first publication of the poem 'Ingin Jadi Nasrallah' where the appellant had contributed the poem for a special edition of the *Dewan Sastera* magazine in respect of the Lebanon War (against Israel) which was an initiative by Dewan Bahasa dan Pustaka to express solidarity with the people affected by that war in which Hezbollah was at the forefront; and

(b) support and sympathy for this group came not only from the appellant but also from the Government of Malaysia (through the former Foreign Minister Datuk Seri Syed Hamid Albar), former Prime Minister Tun Dr

A Mahathir Mohamad, *Utusan Malaysia*, PAS Youth and the *Dewan Sastera* magazine.

[35] Therefore, learned counsel for the appellant further submitted, it is clear that support for this group is widespread and has not caused disunity that
B is prejudicial to public order and security. He also submitted, the respondent failed to provide any reasons why sympathy for Hezbollah will cause a split amongst Muslims and prejudice public order or security.

[36] The line 'wajib kita tebus kembali' is alleged to be an attempt to
C instigate hatred towards Saidina Abu Bakar and his companions with regard to the event of the dispossession of the Fadak Land and this is said to be a provocation which may give rise to a conflict between followers of Ahli Sunnah Wal Jamaah and Shias.

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[37] He further submitted in the poem 'Ingin Jadi Nasrallah', the appellant had never mentioned the names of Saidina Abu Bakar RA or his fellow companions and had not referred to the Fadak Land as a dispossessed land. Therefore, there is neither evidential nor reasonable basis for the Minister to
E state that the line is an attempt to instigate hatred towards Saidina Abu Bakar and his companions with regard to the Fadak Land.

[38] We cannot but agree with learned counsel for the appellant on this. As alluded before, we had ourselves read the four books. We could not understand
F how the four books could create public disorder or a threat to security. For example in 'Tiga Kali Seminggu' the short story 'Rindu Ini Luar Biasa' is about two people falling in love during their fight to elevate the use of Bahasa Malaysia and how position, status and power can change people's viewpoint. The short story of 'Bulan Penuh di Saigon' is about a woman who was
G determined to look for her real mother upon discovery that she was actually an adopted child, after her adopted mother passed away. The short story of 'Cinta Medeni' to us is a pure love story.

[39] Now take the book of 'Ingin Jadi Nasrallah'. The poem 'Balada Orang
H Berdosa' for example is nothing but the expression of guilt by someone who feels that he has committed so much sins that now he has repented and shows remorse and ask for forgiveness from his Creator. The poem 'Baitullah' is nothing but about the Baitullah, the House of God for Muslims.

I **[40]** Those are some of the examples. What we want to stress here is where is the part that could create public disorder and would threaten national security, except for those few lines mentioned earlier, which we agree with learned counsel for the appellant, are not evidence of prejudice to public order and security? Merely stating that the respondent was following the decision of

Jawatankuasa Fatwa in our view is not sufficient to prove that the four books are likely to be prejudicial to public order and security as Jawatankuasa Fatwa's decision has not mentioned the four books. To state that the prohibition is on the recommendation of Bahagian Kawalan Penerbitan dan Teks Al Quran and on advise of experts from JAKIM without showing more is also in our view not enough to show that the four books are likely to be prejudicial to public order and security. Such statement becomes bare assertion especially so when the prohibition is being challenged by the appellant.

[41] In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665, it was held, inter alia, by this court:

> 14. The Minister may not be procedurally compelled to furnish his reasons. But if he gives no reasons or inadequate reason, then it is open for a Court to conclude that he had no good reasons or inadequate reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

[42] It also perplexed us how do 'Karbala' and 'Sebongkah Batu di Kuala Berang' offend sub-s 7(1) of Act 301 when there is no specific allegation pointed out by the respondent in his affidavit on these two books.

[43] Even if indeed it is true that those few lines show the four books are likely to be prejudicial to public order and security, is it justified for the respondent to prohibit the whole four books? As we mentioned earlier, some are merely love stories. The definition section of Act 301 is found is s 2. In s 2, 'publication' is defined not only to include a book but also a document. 'Document' is defined, inter alia, as paper on which is printed, typed, written and also includes book. As such, if certain pages of the four books are found to offend sub-s 7(1) of Act 301, the Act allows for the removal of the pages which are 'documents' and thus 'publication' under Act 301. See *ZI Publication*. As such, the prohibition of the whole four books in our considered view is a very drastic act, irrational, unreasonable, disproportionate and tainted with procedural impropriety.

[44] In conclusion we would like to again emphasise that we are only concerned with what is legally valid according to legal norm and principles. Based on the circumstances and facts of this case, we therefore find that the order is not made in accordance with sub-s 7(1) of Act 301 and therefore illegal. We also find that the order is indeed a restriction on the appellant's constitutional and fundamental right to freedom of expression. Although admittedly the right is not absolute, we agree with learned counsel for the appellant that the court must nonetheless give primacy to it. Only in the

clearest case of potential prejudice to public order that this right can be suppressed, which in our considered opinion, is not so in this instant case.

[45] Those reasons in our view are enough to enable us to allow this appeal without having to delve on other issues. The appeal is therefore allowed with costs of RM20,000 subject to payment of allocator fee. The appellant is granted relief as in paras 1.1 and 1.2(a), (b) and (c) of the judicial review application. On relief for damages, we note there was no argument put by the parties before us, hence we will not make any order for that relief.

Appeal allowed with costs of RM20,000 subject to payment of allocator fee.

Reported by Afiq Mohamad Noor